(1)

Supreme Court, U.S.
FILED

97 823 SEP - 8 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NANCY GRACIA,

Petitioner,

v.

VOLVO EUROPA TRUCK, N.V.,
a foreign corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BRUCE R. PFAFF
BRUCE R. PFAFF & ASSOCIATES, LTD.
One East Wacker Drive
Suite 3610
Chicago, Illinois 60601
(312) 828-9666

Counsel of Record for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

10788

QUESTION PRESENTED

Does the National Transportation and Motor Vehicle Safety Act preempt Petitioner's common law tort claim of a windshield retention defect when there is no federal statute or Motor Vehicle Safety Standard in effect regulating windshield retention in the subject truck?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OFFICIAL AND UNOFFICIAL CASE CITATIONS 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. The Seventh Circuit's decision defies this Court's resolution of this issue in *Freightliner Corp. v. Myrick* 6

II. All courts to reach this precise issue have ruled against preemption 9

III. The majority of state courts of last resort to reach the issue of preemption under any circumstance have found that the Safety Act does not preempt common law tort claims 11

IV. All Circuit Courts and state courts of last resort finding preemption have done so in cases involving Standard 208 14

V. The decision of the Seventh Circuit conflicts with the express legislative intent behind the Safety Act 17

CONCLUSION 26

APPENDIX A – Recommendation And Report of Magistrate Judge A-1

APPENDIX B – Memorandum Opinion and Order of District Court B-1

APPENDIX C – Opinion of Seventh Circuit Court of Appeals and Order Denying Rehearing . . C-1

APPENDIX D – Statutes and Regulations D-1

TABLE OF AUTHORITIES

Cases PAGE

A.I.A.M. v. Abrams, 84 F.3d 602 (2d Cir. 1996) 25

Arbet v. Gussarson, 66 Wis.2d 551, 225 N.W.2d 431 (Wis. 1975) 12

Attocknie v. Carpenter Manufacturing, Inc., 901 P.2d 221 (Okla. App. 1995) 9

BFP v. Resolution Trust Corp., 114 S. Ct. at 1765 26

Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777 (3rd Cir. 1992) 14

Comstock v. General Motors Corp., 99 N.W.2d 627 (Mich. 1959) 18

Cooper v. General Motors, 1996 WL 272362 (Miss. 1996) 13

Doyle v. Volkswagenwerk AG, 114 F.3d 1134 (11th Cir. 1997) 16

English v. General Elec. Co., 496 U.S. 72 (1990) . . . 26

Freightliner Corp. v. Myrick, 514 U.S. 280, 115 S. Ct. 1483 (1995) 5, 6, 7, 9

Grunback v. Dime Savings Bank of New York, 74 F.3d 331 (1st Cir. 1996) 24

Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997) 14

In re Ford Motor Company Bronco II Products Liability Litigation, 909 F.Supp. 400 (E.D. La. 1995) 9, 10, 11

Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. den.*, 494 U.S. 1065 (1990) 14

Larsen v. General Motors, 391 F.2d 495 (8th Cir. 1968) 16

Montag v. Honda Motor Co., 75 F.3d 1414 (10th Cir. 1996) 14

Munroe v. Galati, 938 P.2d 1114 (Ariz. 1997) 13

Perry v. Mercedes Benz of North America, Inc., 957 F.2d 1257 (5th Cir. 1992) 15, 16

Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990), *cert. den.*, 498 U.S. 853 (1990) 14

Tebbetts v. Ford, 665 A.2d 345 (N.H. 1995) 12

United States v. James, 478 U.S. 597 (1986) 12

Wilson v. Pleasant, 660 N.E.2d 327 (Ind. 1995) ... 12

Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. den.*, 494 U.S. 1065 (1990) 14

Zimmerman v. Volkswagen of America, Inc., 920 P.2d 67 (Idaho 1996) 13

Statutes and Regulations

15 U.S.C. § 1381 ..... 2, 4, 7

15 U.S.C. § 1392(d) 2, 9

15 U.S.C. § 1397(c) 25

15 U.S.C. § 1397(k) 2

15 U.S.C. § 1410(b) 14
28 U.S.C. § 1291 3
28 U.S.C. § 1441(b) 2
49 U.S.C. § 30101 ..... 4, 7
49 U.S.C. § 30103(b) 8
49 U.S.C. § 30103(e) 9
49 C.F.R. § 571 4
49 C.F.R. § 571.121 ..... 2, 6
49 C.F.R. § 571.208 ..... 2, 14
49 C.F.R. § 571.212 ..... *passim*

OFFICIAL AND UNOFFICIAL CASE CITATIONS

The unreported Recommendation and Report of Magistrate Judge Rebecca Pallmeyer denying Volvo Europa Truck N.V.'s ("Respondent's") motion for summary judgment on the issue of preemption, dated March 6, 1996, is reproduced at Appendix A. The unreported Memorandum Opinion and Order of District Judge Paul Plunkett granting Respondent's motion for summary judgment, dated June 20, 1996, is reproduced at Appendix B. The reported opinion of the United States Court of Appeals for the Seventh Circuit, *Gracia v. Volvo,* 112 F.3d 291 (7th Cir. 1997), affirming Judge Plunkett's order, is reproduced at Appendix C.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on April 24, 1997. Petitioner's timely Petition for Rehearing is reproduced at Appendix C and was denied on June 10, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994) and Supreme Court Rules 10(a) and (c).

STATUTES INVOLVED

15 U.S.C. § 1381, reenacted as 49 U.S.C. § 30101 (1994)

15 U.S.C. § 1392(d), reenacted as 49 U.S.C. § 30103(b) (1994)

15 U.S.C. § 1397(k), reenacted as 49 U.S.C. § 30103(e) (1994)

49 C.F.R. § 571.121 (1996)

49 C.F.R. § 571.208 (1996)

49 C.F.R. § 571.212 (1996)

The relevant text of these statutes and regulations is reproduced at Appendix D.

STATEMENT OF THE CASE

This action was removed from the Circuit Court of Cook County, Illinois, to the United States District Court, Northern District of Illinois. Federal jurisdiction was premised on the diversity of citizenship between the parties under 28 U.S.C. § 1441(b) (1994). Petitioner resides in Illinois, and seeks damages in excess of the jurisdictional minimum. Respondent is incorporated in and has its principal place of business in Ghent, Belgium. Petitioner appealed from the District Court's order granting summary judgment to Respondent. That order was signed and judgment entered thereon June 20, 1996. Petitioner's Notice of Appeal was filed on July 17, 1996, and the appeal was docketed on July 19, 1996. The

United States Court of Appeals for the Seventh Circuit had jurisdiction of this appeal under 28 U.S.C. § 1291 (1994).

Petitioner sued Respondent for personal injuries she suffered after being ejected from the passenger compartment of a Volvo truck during a rear end impact with another vehicle. Respondent designed and manufactured the truck, which Petitioner alleged was defective under Illinois law in that: (a) the windshield retention system was weak and inadequate to prevent the windshield from popping out of the truck during foreseeable impacts; and (b) there were insufficient devices within the truck to prevent ejection of vehicle occupants through the windshield in the event of a frontal collision.

Petitioner was one of three occupants in the truck, which was driven by a fellow employee in rush-hour traffic. When the truck rear-ended another vehicle, its windshield popped out and Petitioner was ejected onto the pavement, sustaining a burst fracture of her spine. Today, she suffers residual spinal cord injury. Petitioner would not have suffered any serious injury had the windshield stayed in place in the accident sequence.

As it relates to the issue on appeal, Petitioner's expert opined that the truck was defective because the windshield was not bonded to the frame of the cab, typically accomplished with an adhesive or a metal flange and a rubber seal. The truck's windshield was held into the frame only by a rubber part; there was no adhesive or metal strip to prevent the windshield from popping out of the cab's frame in a collision. These design deficiencies made the truck unreasonably dangerous. Had the windshield been bonded to the truck's cab, it would not have

popped out, and Petitioner would not have been ejected from the truck. The severity of an occupant's injuries greatly increases when an occupant is ejected from a vehicle.

By authority of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381, recodified without substantive change at 49 U.S.C. § 30101 (1994) (hereinafter the "Safety Act"), Federal Motor Vehicle Safety Standards have been promulgated by the National Highway Traffic Safety Administration ("NHTSA"). 49 C.F.R. § 571 (1996). The only standard relevant to this appeal is Standard 212, which deals with windshield mounting and retention. 49 C.F.R. § 571.212 (1996).

Standard 212 excludes from its scope vehicles whose gross vehicle weight rating (GVWR) exceeds 10,000 pounds, and the standard does not apply to "forward control vehicles." 49 C.F.R. § 571.212 (paragraphs S3 and S4). The truck has a GVWR in excess of 10,000 pounds, and is considered a "forward control vehicle" due to its cab configuration. The parties agree that Standard 212 does not apply to the subject truck because of its weight and configuration.

Standard 212 states a minimum performance standard for vehicles to which it applies. It requires that when a test vehicle contacts a fixed collision barrier at 30 m.p.h., no less than 50 percent of the windshield periphery shall be retained in the windshield frame. 49 C.F.R. § 571.212 (See paragraphs S5.1 and S5.2).

Respondent maintains that since Standard 212 excluded from its scope vehicles like the subject truck, NHTSA intended there to be no regulation of windshield retention of such vehicles, either by federal rule or state

common law. Respondent argues that the exclusion of this vehicle from Standard 212 serves to preempt Petitioner's common law claim that the windshield retention system was defective under Illinois common law. Respondent filed a motion for summary judgment, which Magistrate Judge Pallmeyer recommended be denied; she compared NHTSA's decision to exclude certain vehicles from Standard 212 to NHTSA's decision to forego regulation of brake systems on certain vehicles, which was found not to warrant preemption in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483 (1995). Appendix A. Judge Plunkett rejected Magistrate Judge Pallmeyer's recommendation, finding that "NHTSA's explicit exclusion of forward control vehicles from Standard 212 expressly preempts the aspect of performance of windshield retention for such vehicles." Appendix B. The Seventh Circuit affirmed on similar grounds. Appendix C.

REASONS FOR GRANTING THE WRIT

This case presents the identical legal issue as *Freightliner v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483 (1995), but the Courts below reached the opposite and incorrect result. This Court's holding in *Myrick* controls the outcome of the present case. The only method available for correcting this error is the granting of this petition.

The Seventh Circuit is the *only* court in the country to find preemption of a common law tort claim by a motor vehicle safety standard *which does not apply to the vehicle in question*. The majority of state courts of last resort to reach the issue of preemption under any circumstance have found that the Safety Act does not preempt common law tort claims. All Circuit Courts and

state courts of last resort finding preemption have done so only in cases involving Standard 208, the passive restraint/airbag standard, which poses a somewhat different preemption question than the instant case.

To allow this decision to stand would frustrate the purpose and intent behind the Safety Act to foster public safety.

I. The Seventh Circuit's decision defies this Court's resolution of this issue in *Freightliner Corp. v. Myrick.*

In *Myrick,* this Court rejected a claim brought by a truck manufacturer that the absence of a motor vehicle safety standard requiring anti-lock brakes preempted plaintiff's common law claim against it. Justice Thomas wrote the opinion in which seven Justices joined, with Justice Scalia concurring only in the judgment. This Court stated in the first paragraph of its decision: "*we hold that the absence of a federal standard cannot implicitly extinguish state common law.*" *Freightliner v. Myrick, supra* at 1485.

Myrick construed the Motor Vehicle Safety Act at issue in this case. It referenced Motor Vehicle Safety Standard 121, which concerns braking standards for vehicles. Standard 121's stopping distance and lock-up requirements do not apply to trucks and trailers, similar to the exclusion of certain vehicles in Standard 212 at issue in the instant case. 49 C.F.R. § 571.121 (1996) (paragraph S3).

This Court carefully analyzed the purposes of the Safety Act, and construed the Act as a whole to determine whether Congress intended to preempt common law

actions. It noted that the express purpose of the Safety Act is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381, reenacted as 49 U.S.C. § 30101 (1994); *Freightliner v. Myrick, supra* at 1485.

This Court held that the Act's "preemption clause applies only '[w]henever a federal motor vehicle safety standard . . . is in effect' with respect to 'the same aspect of performance' regulated by a state standard." 15 U.S.C. 1392(d), reenacted as 49 U.S.C. § 30103 (1994), *Freightliner v. Myrick, supra* at 1487. Since there is no express federal standard addressing stopping distances for trucks or trailers (because of the exclusion in Standard 121 for those vehicles), states are free to establish or to continue in effect their own safety standards concerning those aspects of performance. *Freightliner Corp. v. Myrick, supra*. In this case, as in *Myrick*, Standard 212 is not "in effect" for the subject truck, therefore, there can be no federal preemption of Petitioner's common law claim.

The *Myrick* Court did not reach the argument raised by petitioner that the term "safety standard" in 15 U.S.C. 1392(d), reenacted as 49 U.S.C. § 30103 (1994), preempts only state statutes and regulations, but not common law actions. The Court likewise did not need to address petitioner's claim that the savings clause does not permit a manufacturer to use a safety standard to immunize itself from state common law liability. *Freightliner v. Myrick, supra* at 1487.

In concluding, this Court held that the preemption argument made by the truck manufacturers is:

> . . . ultimately futile . . . because respondents' common law actions do not conflict with federal law. First, it is not impossible for petitioners to

> comply with both federal and state law because there is simply no federal standard for a private party to comply with. Nothing in the Safety Act or its regulations currently regulates the use of ABS devices. As Standard 121 imposes no requirements either requiring or prohibiting ABS systems, tractor trailer manufacturers are free to obey state standards concerning stopping distances and vehicle stability. *Freightliner Corp. v. Myrick, supra* at 1488.

The holding in *Myrick* directly controls the result that should be reached in the instant case. Like Standard 121 at issue in *Myrick*, Standard 212 exempts certain vehicles from its reach, including the subject truck. There is no federal safety standard in effect for the subject truck regarding windshield mounting or retention capabilities. Accordingly, the common law duty to sell this truck with a reasonably safe windshield retention system does not conflict with federal law, and cannot be preempted.

The Safety Act has two clauses (commonly called the "preemption clause" and the "savings clause") which must be read together to determine whether Congress intended that common law actions be preempted or preserved. The preemption clause states:

> *Whenever a Federal Motor Vehicle Safety Standard established under this subchapter is in effect, no state* or political subdivision of a State *shall have any authority* either *to establish*, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment *any safety standard* applicable to the same aspect of performance of such vehicle or item of equipment *which is not identical to the federal standard*. Nothing in this section shall be construed as preventing any state from enforcing any safety

> standard which is identical to a federal safety standard. 15 U.S.C. 1392(d), reenacted as 49 U.S.C. § 30103(b) (1994). Italics added.

The savings clause of the Act provides:

> Compliance with any federal motor vehicle *safety standard* issued under this subchapter does not exempt any person from *any liability under common law*. 15 U.S.C. 1397(k), reenacted as 49 U.S.C. § 30103(e) (1994). Italics added.

Petitioner also raises the two substantial arguments never reached in *Myrick*: that the preemption clause only negates conflicting state *safety standards*, as defined by the Safety Act, and not common law actions; and that the savings clause protects from preemption all common law actions brought to recover damages for defects proven without regard to compliance with any federal motor vehicle safety standard. This Court did not need to reach these issues in *Myrick* because it determined that there can be no preemption since there was no federal safety standard "in effect" for the vehicle. Cf. 15 U.S.C. 1392(d), reenacted as 49 U.S.C. § 30103(b) (1994). That same result should be reached here, in light of the exclusion from Standard 212 of vehicles like this truck.

II. All courts to reach this precise issue have ruled against preemption.

Other than this Court in *Myrick*, only two other courts have faced the issue of preemption where the subject vehicle did not fall within the scope of a particular safety standard. *Attocknie v. Carpenter Manufacturing, Inc.*, 901 P.2d 221 (Okla. App. 1995); and *In re Ford Motor Company Bronco II Products Liability Litigation*, 909 F.Supp. 400 (E.D. La. 1995).

Attocknie involved a claim against a manufacturer for failing to provide seatbelts on a bus. Standard 222 is a seatbelt provision, but it does not require school buses with a GVWR in excess of 10,000 pounds to have seatbelts (just as Standard 212 here did not require similarly sized vehicles to meet the windshield retention crash test standard). The Court relied on the savings clause to rule that the action was not preempted:

> "Standard 222, established by federal law under the Safety Act, sets forth the requirements for school bus passenger seating protection and restraining barriers for buses with a GVWR of 10,000 or more. The Standard does not require seatbelts for passengers in these buses. The Safety Act specifically and expressly through its preemption provisions, saved this state tort cause of action through its savings provision." *Attocknie, supra* at 226.

Also similar to the instant case is *In Re Ford Motor Company Bronco II Products Liability Litigation, supra.* Vehicle owners sued Ford claiming their vehicles were unduly prone to rollover. Ford moved for judgment on the pleadings, claiming that the common law actions were preempted by the Safety Act because NHTSA determined that stability regulation of light utility vehicles is unwarranted. *In Re Ford Motor Company Bronco II Products Liability Litigation, supra* at 403. Just as Respondent did below, Ford argued that a history of the NHTSA activity indicated that the agency made a conscious determination to reject any role for utility vehicle stability standards, and that this "determination" has the character of a ruling of non-regulation. *In Re Ford Motor Company Bronco II Products Liability Litigation,*

supra at 407. This is the exact argument made by Respondent in this case and accepted below.

The Court rejected Ford's contention:

> The preemption scenario relied on by Ford, though tenable, is the most nebulous possible setting for the finding of preemption. First, Ford relies not on any actual, written safety standard promulgated under the Safety Act, but on the *absence* of agency action which Ford contends has the "character of a policy or ruling of non-regulation." Second the allegedly conflicting state standard likewise is not an actual, written safety standard or regulation, but rather a common law action for damages. Finally, the existence of an express preemption clause that does not mention common law claims, coupled with the savings clause that appears to preserve such claims, provides fairly reliable indicium of congressional intent not to preempt such claims by expression or implication. *In Re Ford Motor Company Bronco II Products Liability Litigation, supra.*

The only courts to confront preemption by a federal safety standard where the subject vehicle is not within the scope of that standard have all found against preemption of common law tort claims. The Seventh Circuit's refusal to follow this Court's decision in *Myrick* and the holdings in *Attocknie* and *In re Ford Motor Company Bronco II* is incorrect, and should be reversed.

III. The majority of state courts of last resort to reach the issue of preemption under any circumstance have found that the Safety Act does not preempt common law tort claims.

The Supreme Court of Wisconsin addressed the issue of preemption by the Safety Act over twenty years ago in

Arbet v. Gussarson, 66 Wis.2d 551, 225 N.W.2d 431 (Wis. 1975). That Court held that the Safety Act did not preempt common-law tort claims. Emphasis was placed on the savings clause, which illustrated Congressional intent that federal regulations *supplement but not supplant* the common law of products liability. *Arbet v. Gussarson, supra* at 438.

Tebbetts v. Ford, 665 A.2d 345 (N.H. 1995) was a hotly disputed airbag preemption case decided in the fall of 1995. Amicus briefs were tendered on behalf of the automotive industry, and on behalf of injured parties. In its concise and clear opinion, the New Hampshire Supreme Court reviewed the Safety Act, along with the legislative history, and determined that compliance with motor vehicle safety standards does not preempt state common law. *Tebbetts v. Ford, supra* at 345-348. The court noted, relying on *United States v. James*, 478 U.S. 597, 604 (1986), that "it is difficult to imagine broader language" than the savings clause: "compliance does not exempt any person from any liability under common law." *Tebbetts v. Ford, supra* at 347. The Supreme Court of New Hampshire reversed defendant's preemption summary judgment, and remanded the cause for trial on the merits of the common law claim.

The Indiana Supreme Court also held that the Safety Act does not preempt a claim for failure to install airbags. *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995).

> After examining the stated purposes and policies of the Safety Act, the statutory language at issue, and the legislative and regulatory history, we are convinced that Congress was focused first and foremost on 'reducing traffic deaths and injuries and deaths to persons resulting from

> traffic accidents' and that its strategy was to pursue those purposes both through federal regulation and state common law. Because compliance with Rule 208 and recognition of plaintiff's claim here is not 'physically impossible', and because recognition of the claim here does not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' - indeed, we believe it furthers them - we find no basis for implying preemption of plaintiff's claim. *Wilson v. Pleasant, supra* at 339.

Most recently, the Arizona Supreme Court held that common-law tort claims were not preempted by the Safety Act. *Munroe v. Galati*, 938 P.2d 1114 (Ariz. 1997). The Court, en banc, stated, "[w]e find no preemption, express or implied, of common-law tort claims based on a manufacturer's compliance with federal *minimum* standards and failure to provide safety devices permitted but not required by the Act." *Munroe v. Galati, supra* at 1120. In finding against preemption, the court placed great emphasis on the language of the savings clause of the Safety Act, stating, "we believe [the savings clause] does not allow a manufacturer to claim federal preemption to avoid state common-law liability claims in air bag cases." *Munroe v. Galati, supra* at 1120.

Only two other state courts of last resort have ruled on this issue. *Cooper v. General Motors*, 1996 WL 272362 (Miss. 1996); and *Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Idaho 1996). Both of these courts found preemption by the Safety Act in situations where Standard 208, the passive restraint/airbag provision, applied to the subject vehicle. See part IV., *infra*.

IV. All Circuit Courts and state courts of last resort finding preemption have done so in cases involving Standard 208.

The First, Third, Ninth, and Tenth Circuits have found common law tort claims for failure to install air bags to be preempted by Standard 208. *Wood v. General Motors Corp.*, 865 F.2d. 395 (1st Cir. 1988), *cert. den.*, 494 U.S. 1065 (1990); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990), *cert. den.*, 498 U.S. 853 (1990); *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. den.*, 494 U.S. 1065 (1990); and *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996). The Supreme Courts of Idaho and Mississippi have also found common law tort claims for failure to install air bags preempted by Standard 208. *Zimmerman v. Volkswagon, supra*; and *Cooper v. General Motors, supra.*

Standard 208 cases are far more likely candidates for preemption than the instant case. Congressional intent not to preempt common law claims is less clear in airbag cases than in other auto product defect cases. Standard 208 provides various design options, anyone of which a manufacturer may use and still comply with the standard. 49 C.F.R. § 571.208 (1996). Also, Congress passed a law, 15 U.S.C. 1410(b) (1994), *prohibiting* NHTSA from requiring airbags without express Congressional approval, discussed in *Wood v. General Motors Corp.*, *supra* at 398-401.

The decisions of the Third Circuit in *Pokorny v. Ford Motor Company, supra*, and *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3rd Cir. 1992) illustrate the difference made by Standard 208 in ruling on preemption of common law tort claims. Plaintiff in *Pokorny* raised

three common law tort claims: 1) failure to equip the vehicle with air bags, 2) failure to equip the vehicle with automatic seat belts, and 3) failure to equip the vehicle with window netting. *Pokorny, supra* at 1118. The Court ruled that plaintiff's first two claims, failure to install air bags and automatic seat belts, were preempted by Standard 208, which allows manufacturers to choose from several options in providing restraint systems for passengers. *Pokorny, supra* at 1123. Placing emphasis on the Savings Clause, the Court found that the third claim, failure to provide protective netting over the windows, did not conflict with Standard 208's regulatory framework, and was therefore not preempted. *Pokorny, supra* at 1126.

In *Buzzard*, plaintiff brought a common law tort claim against a trucking company for defective design of a trailer's illumination system. *Buzzard, supra* at 778. In holding that Standard 108 did not preempt plaintiff's tort claim, the Third Circuit again emphasized the savings clause:

> "In *Pokorny*, we refused to construe the savings clause . . . so narrowly that it would apply only to common law actions wholly beyond the Safety Act's purview. Such a construction would deprive the savings clause of any practical effect." *Buzzard, supra* at 780-1.

As compliance with Standard 108 and the common law duty alleged by plaintiff in *Buzzard* would not have been impossible, the Third Circuit properly ruled against preemption.

The Fifth, Eighth, and Eleventh Circuits have held that common law tort claims are not preempted by the Safety Act. *Perry v. Mercedes Benz of North America,*

Inc., 957 F.2d 1257 (5th Cir. 1992); *Larsen v. General Motors*, 391 F.2d 495, 506 (8th Cir. 1968); and *Doyle v. Volkswagenwerk AG*, 114 F.3d 1134 (11th Cir. 1997). In *Perry*, the Fifth Circuit found that plaintiff's common law tort claim for defective design of an air bag system was not preempted by Standard 208. *Perry, supra* at 1259. The court placed great emphasis on the savings clause, stating:

> "[w]e find that the Savings Clause itself unambiguously reveals Congress' intent to preserve common law liability." *Perry, supra* at 1264.

In *Doyle*, the Third Circuit held that common law tort claims were not preempted by federal safety standards. *Doyle, supra* at 1135. The Court then certified a state law question to the Georgia Supreme Court. *Doyle, supra* at 1135. The Georgia Supreme Court found that Georgia law permits a claim against an automobile manufacturer despite compliance with federal safety standards. *Doyle, supra* at 1135. The issue of preemption having been settled, the Third Circuit thereby remanded the action for further proceedings. *Doyle, supra* at 1135.

As the Eighth Circuit decided years ago in *Larsen v. General Motors*, 391 F.2d 495, 506 (8th Cir. 1968),

> It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability. The common law is not as sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time. The common law standard of duty to use reasonable care in light of all the circumstances can at least serve the

> needs of our society until the legislature imposes higher standards or courts expand the doctrine of strict liability for tort. The Act is a salutary step in this direction and not an exemption from common law liability. *See Tebbetts v. Ford Motor Company, supra* at 348 (N.H. 1995).

There is a substantial split in the Circuit Courts on the issue of preemption of common law tort claims under the Safety Act. Preemption has been refused in Fifth, Eighth, and Eleventh Circuits. Preemption of failure to provide airbag cases has been upheld in the First, Ninth and Tenth Circuits. In the Third Circuit, failure to provide airbag claims are preempted, but other common law tort claims are not preempted. In view of this split, the Court should allow this Petition to restate and reaffirm its definitive holding in *Freightliner v. Myrick, supra*, denying preemption where meeting the common law duty will not conflict with any motor vehicle safety standard.

V. The decision of the Seventh Circuit conflicts with the express legislative intent behind the Safety Act.

The legislative history of the Safety Act allows but one conclusion: that state common law claims are not preempted. In enacting the Safety Act in 1966, Congress was well aware of the existence of common law design defect lawsuits of the type involved here. *See, e.g., Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 1256-57 (1966) ("*House Hearings*") (testimony of Representative Charles P. Farnsley regarding design defect litigation involving the General Motor's Corvair); *id.* at 1315 (statement of Daniel P. Moynihan regarding the

case of *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959); *House Hearings* at 1351 (statement of Mr. Maurice A. Garbell concerning Corvair design defect litigation); *Hearings on S. 3005 Before the Senate Committee on Commerce*, 89th Cong. 2d Sess. 252 (1966) (testimony of Dr. Seymour Charles noting the pendency of 100 lawsuits challenging the safety design of the Corvair). *See also generally* Kurt B. Chadwill, *Automobile Passive Restraint Claims Post-Cipollone: An End To The Federal Preemption Defense*, 46 Baylor L. Rev. 141, 178 n.223 (1994).

In light of this knowledge, the Safety Act's preemption provision and savings provision were crafted by Congress with the intent to ensure that the Act did not preempt any common law actions.

The bill reported out of the Senate Commerce Committee and passed by the full Senate, S.3005, 89th Cong. 2d Sess. (introduced on March 2, 1966) contained a preemption provision, section 104 of the bill, similar to the bill ultimately enacted into law, except that it did not contain the "same aspect of performance" limitation. *See* 112 Cong. Rec. 14,257 (1966). However, the Senate bill did not include a savings provision. Even so, the Senate Committee Report stated:

> [T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law. S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966).

Senator Magnuson, the sponsor of the Senate bill, stated on the floor of the Senate that:

> Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The *common law on product liability still remains as it was*. 112 Cong. Rec. 14,230 (1966) (emphasis added).

The original House bill contained a preemption provision, section 102(b), similar to the preemption provision in the Senate bill, and like the Senate bill, did not contain a savings provision. *See* H.R. 13228, 89th Cong. 2d Sess. (introduced on March 2, 1966). During the Interstate and Foreign Commerce Committee hearings on that bill, an attorney from South Carolina raised the following pointed concern regarding the possible effect of the House bill on the liability of manufacturers under state law:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets Government standards," and an already compounded problem will be recompounded. *House Hearings* at 1249 (testimony of Mr. Tom Triplett).

Representative Farnsley, a member of the Committee, referred to this testimony a few moments later:

> This gentleman has raised, perhaps not brilliantly but I think well, [a] question . . .
>
> He said Brer Rabbit told Brer Fox "Don't throw me in the briar patch." . . .
>
> . . . Now the question is up: Is the manufacturer responsible for inherent dangerous design? If there are Federal standards, this man has said this brings an absolute wall against those suits, and he feels that the manufacturers want these standards. I think maybe he has a point.
>
> . . . .
>
> [T]he courts, under the old common law and our statutes, hold them responsible. Now I think we should take a long time before we change that responsibility. I have talked longer than I intended to, but I feel this is very important. *Id.* at 1256-57.

Representative Farnsley then engaged in the following colloquy with committee Chairman Staggers, who was the sponsor of the House bill:

> THE CHAIRMAN. I would say to you again, and I have this much faith and I know you do too, in the men who sit on this committee, that *we will not put an umbrella over anyone.*
>
> MR. FARNSLEY. Good. You believe, then, you can set Federal standards and this isn't a defense in a lawsuit, to say, "We have met Federal standards"? This is what this witness said.
>
> THE CHAIRMAN. *That is not the intent of this legislation.*
>
> MR. FARNSLEY. I know it is not the intent, but is it possible?

> THE CHAIRMAN. It could be if we did not accept our responsibility here as a committee. *But we do not intend to put that umbrella up, I assure you. Id.* at 1258 (emphasis added).

Representative Mackay intervened to drive home the point:

> With regard to Title I, which I predict is going to be the real hard nut to crack in the minds of the committee because of its complexity, the agency bill provides for certification of vehicles that actually met minimum safety standards.
>
> This does not preclude building a car with higher standards of safety, *nor does it relieve makers of any legal liability whatsoever in terms of their obligation to the consumer.* [*Id.* at 1260 (emphasis added).]

Consistent with the foregoing, the House Committee amended the original House bill by inserting a savings provision, section 108(c) of the House bill, identical in all respects to the savings provision that was signed into law: "Compliance with *any* Federal motor vehicle safety standard issued under this title does not exempt *any* person from *any* liability under common law." *See* 112 Cong. Rec. 19,625, 19,657 (1966) (emphasis added).

The savings provision was explained in the House Committee Report as follows:

> *Common Law Liability.* Section 108(c) of the reported bill provides that compliance with any Federal motor vehicle safety standard does not exempt a person from any liability under common law.
>
> It is intended and this subsection specifically establishes, that *compliance with safety stan-*

> *dards is not to be a defense or otherwise to affect the rights of parties under common law, particularly those relating to warranty, contract, and tort liability.* [H.R. Rep. No. 1776, 89th Cong. 2d Sess. 24 (1966) (*"House Report"*) (emphasis added).

During the floor debates on the reported House bill, Representative O'Neill proposed an amendment that would have strengthened the remedial provisions of the bill by adding criminal penalties for willful violations of the Act. In opposing this amendment, Representative Dingell, a member of the House Committee that had reported the bill, stated:

> We are told . . . that this legislation is not strong enough. A look at the bill, at what the committee has brought to the floor, disproves this . . . *[W]e have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser.* This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer. 112 Cong. Rec. 19,663 (1966) (emphasis added).

A Senate-House Conference Committee was convened to reconcile the differences between the Senate and House bills. The Conference Committee adopted the savings provision of the House bill *in haec verba*, and also adopted the House version of the preemption provision with certain minor changes not relevant here.

The Conference Committee Report made no mention of the Senate's agreement to the savings provision included in the House bill. But the Senate conferees' understanding of the savings provision was clearly stated on the

floor of the Senate by Senator Magnuson, the sponsor of the Senate bill, as well as by Senator Cotton, a conferee. Senator Magnuson stated:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. This provision makes explicit, in the bill, a principle developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards. No court rules of evidence are intended to be altered by this provision. 112 Cong. Rec. 21,487 (1966).

Senator Cotton explained:

> The Senate conferees also yielded on a provision, inserted by the House, declaring that compliance with any Federal standard does not exempt any person from liability under common law. Nevertheless, it seems clear and was, I believe, the consensus of the conferees on both sides, that proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it. 112 Cong. Rec. 21,487 (1966).

This review of the language and history of the Safety Act's preemption provision and savings provision should dispose of any argument that the Act expressly preempts petitioner's common law tort action. The preemption provision does not even come into play here both because state tort law is not a "safety standard" and because Standard 212 does not regulate the "aspect of performance" at issue in the common law tort claims brought by petitioner. More fundamentally, as the language of the preemption provision and the savings provision reveals,

and as the legislative history confirms, Congress did not intend those provisions to preempt common law tort actions. The history shows that Congress did not intend the preemption provision to have that effect, and Congress made doubly certain that the Act would not preempt common law actions by adding the savings provision. The House Report summarizes the point in words that bear repeating here:

> It is intended and [the savings provision] specifically establishes, that [as a matter of federal law] compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to . . . tort liability. *House Report* at 24.

Congress' intent and the language of the Act govern issues of preemption. Even if the relevant federal agency has an interpretation of preemption, ". . . an interpretation rendered by an agency responsible for administering the statute is entitled to no special deference. [citations omitted]. In all events, *the courts will reject an agency interpretation which conflicts with Congressional intent.*" *Grunback v. Dime Savings Bank of New York*, 74 F.3d 331, 336 (1st Cir. 1996). To the extent that the Seventh Circuit found NHTSA's intent favored preemption, such conclusion should be entirely disregarded as it conflicts with express Congressional intent that common law claims survive.

The Courts below relied entirely on their view of NHTSA's intent, which Petitioner believes is legally irrelevant in light of the strong evidence of Congressional intent. If NHTSA's intent is relevant to this Court's consideration of this case, *what is most ironic about the Judgment is that NHTSA thinks it is wrong.*

During the pendency of the appeal, a request was made to NHTSA by Trial Lawyers for Public Justice, P.C., to participate as an amicus, or to tender a letter of opinion. NHTSA declined to file an amicus brief, but it did tender a four page opinion letter for consideration by the Seventh Circuit. In that letter, NHTSA stated that it "disagreed with both the result and the rationale adopted by the District Court." NHTSA further stated "the District Court's opinion is incorrect." Plaintiff's motion for leave to file that document was denied by the Seventh Circuit. In another preemption case, an opinion letter from NHTSA's Acting Chief Counsel, Mr. Womack, was accepted and reviewed by the Court in its decision. *A.I.A.M. v. Abrams*, 84 F.3d 602, 610 (2d Cir. 1996). Plaintiff respectfully asks if NHTSA's intent concerning preemption is considered relevant, that this Court consider Mr. Womack's opinion letter or invite NHTSA to file an amicus brief to address the issues raised by this Petition.

Preemption is the exception not the rule. Congressional intent to preempt must be clear and manifest. Nowhere is it written in this Record, nor is it stated in any congressional debate, that Congress intended common law claims be preempted by NHTSA's non-regulation. Congress, by its words, intended that all common law claims be preserved, even if the product complied with relevant Safety Standards. 15 U.S.C. 1397(c).

The language and history of these provisions leave no room for the conclusion that the Safety Act preempts Petitioner's common law tort claims. It is simply implausible to find in the preemption provision and the savings provision a "'clear' and 'manifest'" federal statutory purpose "[t]o displace traditional state [law] in such a man-

ner." *BFP v. Resolution Trust Corp.*, 114 S. Ct. at 1765 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)). To the contrary, Congress reconciled the federal interests in regulating motor vehicle safety and the state interests in preservation of common law tort remedies for those injured in motor vehicle accidents by determining that both schemes should coexist.

CONCLUSION

This Court's holding in *Myrick* controls the outcome of the present case, yet the Courts below did not follow this Court's precedent. The Seventh Circuit is the *only* court in the country to find preemption of a common law tort claim by a federal motor vehicle safety standard *which does not apply to the vehicle in question*, defying the clear language of *Myrick*. The majority of state courts of last resort to reach the issue of preemption under *any* circumstance have found that the Safety Act does not preempt common law tort claims. All Circuit Courts and state courts of last resort finding preemption, other than in this case, have done so in cases involving the airbag standard, which raises a somewhat different issue than the instant case.

There is no conflict between the common law duties Petitioner seeks to enforce, and the duties imposed upon Respondent by Motor Vehicle Safety Standards. Congressional intent that Petitioner's claim not be preempted is clear, and must be given full effect. Any suggestion that the NHTSA intended its non-regulation of windshield retention of trucks of this size to preempt Petitioner's claim is factually incorrect, and legally not controlling, since Congress' intent concerning preemption is clear and controls.

For these reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

BRUCE R. PFAFF
BRUCE R. PFAFF & ASSOCIATES, LTD.
One East Wacker Drive
Suite 3610
Chicago, Illinois 60601
(312) 828-9666

Counsel of Record for Petitioner